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SPEECH AS CONDITIONAL PRIVILEGE IN NATIONAL LABOR RELATIONS BOARD CASES

BY REYNOLDS C. SEITZ*

Significant since the enactment of the National Labor Relations Act¹ has been the problem of striking a balance between the right of employees to be free from employer interference² and the right of the employer to freedom of speech.

As is always true in connection with a problem of balancing rights and duties, difficulty is seldom encountered in connection with extreme situations. Recognized frankly as fundamental in the adjustment of competing liberties of employer and employee is the axiom that the doctrine of freedom of speech does not sanction any and all kinds of utterances. There has been a full awareness that certain types of speech can always be prohibited because of the conviction that the social good that could come from allowing their free expression is so slight as never to outweigh the advantage of banning them.³ Patently coercive statements, such as one which contains a threat to move the plant if the employees unionize,⁴ one which contains threats of dis-

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¹ 49 Stat. 449 (1935), 29 U. S. C. A. sec. 151 (Supp. 1940).

² Sec. 8 (1) of the National Labor Relations Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of their right. (to self-organization)"

³ *Chaplinsky v State of New Hampshire*, 62 Sup. Ct. 766, 769 (1942) *Miller's, Inc. v. Tailors Union*, 15 A. (2d) 824 (N. J.), CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1940) 150; Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 26 *Harv. L. Rev.* 640.

⁴ *N. L. R. B. v. Asheville Hosiery Co.*, 108 F. (2d) 288 (C. C. A. 4th 1939), *Titan Metal Mfg. Co.*, 106 F. (2d) 254 (C. C. A. 3rd 1939), *cert. den.* 308 U. S. 615 (1938), *Stockpole Carbon Co.*, 6 N. L. R. B. 171 (1938), *Matter of Titan Metal Manufacturing Co. and Federal Labor Union No. 19981*, 5 N. L. R. B. 577; *Matter of Leo L. Lowry and International Association of Machinists*, 3 N. L. R. B. 626; *Matter of Remington Rand, Inc., and Remington Rand Joint Protective Board of the District Council Office Equipment Workers*, 2 N. L. R. B. 626.

charge or other discrimination,⁵ or of bodily harm,⁶ are easy to label unfair labor practices within the meaning of the National Labor Relations Act. Also logically falling within the category of unfair labor practices are employer expressions which have occurred against a background of open manifestations of hostility to self-organization.⁷ As suggested by one writer,⁸ it is not difficult to find coercion as a "fact" when employer expressions occur against a background of "discharge of union sympathizers, physical violence in stifling organization efforts, and/or the slowing down of production."

When, however, employer utterances are of a type different than described in the preceding paragraph, much greater precision in thinking is needed to work out an equitable adjustment of the question as to whether or not employer statements are coercive so as to amount to interference within Section 8 (1) of the National Labor Relations Act.

Such a realization has prompted this discussion. It is hoped that some concepts may be set forth which may help to clarify thinking when problems arise which demand a delicate adjustment of employer and employee relationship within the area already described.

The philosophy which motivates Board decisions within the field covered by this article is persuasively set forth in one of the Ford cases.⁹ The Board states. "Whether the words or actions of an employer constitute interference, restraint, or

⁵ N. L. R. B. v. Fruehauf Trailer Co., 301 U. S. 49, rev'g. Matter of Fruehauf Trailer Co. and United Automobile Workers Federal Labor Union, 1 N. L. R. B. 68; Nebel Knitting Co. and American Federation of Hosiery Workers, 6 N. L. R. B. 284.

⁶ Cf. Republic Steel Corporation v. N. L. R. B., 107 F. (2d) 472 (C. C. A. 3rd 1939).

⁷ See Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197 (1938) where the Supreme Court assumed that employer expressions of opinion were unfair labor practices where there was "substantial evidence" that "attempts at intimidation or coercion" were made. Also see Report of the N. L. R. B. to the Senate Committee, p. 60 (1939), which presents the position of the Board on the matter of expression of opinion when coupled with open manifestations of self-organization. See, too, Matter of Sinclair Refining Co. and W. B. McKay, 20 N. L. R. B. No. 75, where the Board stressed that it considers "the entire factual background" in determining whether to sustain or dismiss a complaint alleging that an employer made coercive statements.

⁸ Note (1941) 8 U. of Chi. L. Rev. 350.

⁹ Matter of Ford Motor Company (St. Louis, Mo.), 23 N. L. R. B. No. 28.

coercion, within the meaning of the act, must be judged, not as an abstract proposition, but in the light of the economic realities of the employer-employee relationship. It need hardly be stressed that the dominant position of an employer, who exercises the power of economic life and death over his employees, gives to the employer's statements, whether or not ostensibly couched as argument or advice, an immediate and compelling effect that they would not possess if addressed to economic equals."¹⁰

The Board's adherence to such a viewpoint has resulted in more than one finding of coercion as the outgrowth of employer statements of opinion on union matters in the absence of express threats and intimidation.¹¹ In a considerable number of other cases the Board has found employer expressions of opinion or advice to constitute interference within the meaning of the National Labor Relations Act even though other illegal acts were trivial.¹² The Board's position has indeed been such as to prompt one writer, Killingsworth, to remark that, "The Board appears to approach decision with an attitude of, 'Can this somehow be construed as a violation of the law? Is there a scintilla of coercion in such a statement?'"¹³

Indeed Killingsworth's query appropriately serves as an introduction to references to the opposition that has developed in respect to the Board's finding of coercion in the absence of a "background of hostility." The Board's position has not al-

¹⁰ An attorney for the Board has stated the position in more blunt terms. See, ROSENFARB, *THE NATIONAL LABOR POLICY AND HOW IT WORKS*, 79-80 (1940). There it is said: "Freedom of speech is possible only among those who approximate each other in equality of position. When an employer addresses himself to his employees on the subject of unionism, orally or in writing, directly or through some mouthpiece, economic compulsion comes in through the door and freedom of speech flies out the window." Board member W. M. Leiserson stated, while he was chairman of the National Mediation Board, that unions under the Railway Labor Act have always insisted that employers' opinions on the matter of unionism interfere with employees' freedom of organization; the unions say that such expressions of opinion are always coercive and intimidating, *National Labor Relations Act and Proposed Amendments: Hearings Before the Committee on Education and Labor, United States Senate, 76th Cong. 1st Sess.* (1939), pt. 6, p. 992.

¹¹ See, Killingsworth, *Employer Freedom of Speech and the N. L. R. B.* (1941) Wis. L. R. 217-220, for an analysis of the factual background and the citation of cases.

¹² Note 11, *supra*.

¹³ Note 11, *supra*, at p. 237.

ways met with the approval of Circuit Courts.¹⁴ A University of Chicago Law Review note¹⁵ focuses attention upon the proposition that once the court has enjoined the employer's unfair labor practices, there may be a broad area within which the employer can speak without reasonable employees feeling that they are coerced. Killingsworth¹⁶ wonders if the Board's condemnation of marginal statements of employers may not point out implied threats which the average employee would never discover for himself. Van Dusen¹⁷ very persuasively argues that "since the National Labor Relations Act amply protects employees against discrimination, freedom of expression by employers, when unaccompanied by threats to violate the act, and not consisting of purely defamatory statements, can safely be permitted to stand" because "it constitutes 'no clear and present danger'¹⁸ to the institution of collective bargaining, except insofar as it is able to convince rather than coerce." The National Association of Manufacturers more pointedly asks,¹⁹ "Did Congress intend that the Board should prevent employers from expressing their opinion or stating truthfully the facts about unionism?" The Chamber of Commerce of the United States has uttered statements of the same nature.²⁰ Actually, almost every employer who appeared before the Congressional committees considering amendments to the National Labor Relations Act has offered some criticism along the same general line.²¹ Even the American Federation of Labor²² has not been satisfied with the interpretation of the right to free speech which the Board sometimes makes.

¹⁴ See, Van Dusen, *Freedom of Speech and The National Labor Relations Act* (1941) 35 Ill. L. R. 417-22 for discussion and citation of cases.

¹⁵ 8 *Univ. of Chi. L. Rev.* 350 (1941).

¹⁶ Note 11, *supra* at 238.

¹⁷ Note 14, *supra* at 423.

¹⁸ Criterion adopted by the U. S. Supreme Court to determine whether a limitation upon freedom of speech is justified: *Gitlow v. New York*, 268 U. S. 652, 671 (1925), *Schenck v. United States*, 249 U. S. 47, 51 (1919).

¹⁹ *National Labor Relations Act and Proposed Amendments: Hearings Before the Committee on Education and Labor, United States Senate*, 76 Cong. 1st Sess. (1939), pt. 11, p. 2032.

²⁰ The Chamber's Pamphlet, *Amendment of the National Labor Relations Act* (1939), p. 9.

²¹ Note 11, *supra*, citing examples at p. 212.

²² American Federation of Labor, *Explanatory Comment on American Federation of Labor Amendments to the National Labor Relations Act* (1939), pp. 9-10.

A close analysis of the opposing points of view in regard to the speech issue under the National Labor Relations Act reveal, as is so often the situation, that there is logic in the reasoning of both the employer interests and the union interests. It is the thesis of this article that confusion exists because decision has been based upon a wrong premise. More specifically, it is submitted that the test on the speech issue under the National Labor Relations Act should be on the foundation of conditional privilege rather than on the basis of the "fact" of coercion as it is developed out of evidence which appears in each individual case. To base holdings upon the finding of coercion as a "fact" sidesteps the appeal in the argument that the presence of the National Labor Relations Board and its vigorous enforcement policy should make employees feel so secure against discrimination that it should be found that speech separated from threats and a background of hostility does not coerce.²³ It would appear much less difficult to hold that employer speech on union matters, even though separated from threats and a background of hostility, constituted an "interference" with employees in the "exercise of their right to self-organization"²⁴ in all instances when the employer was not conditionally privileged to express himself.

Upon reflection such reasoning is not specious. Although employer statements might very well not coerce employees, they could interfere with the exercise of the employees' right to self-organization by creating such doubts as to influence them to take action which they otherwise would not have taken. Since much speech tends to convince, it is not unrealistic to adopt the principle that the policy of the National Labor Relations Act treats employer speech on union topics as interference unless it is conditionally privileged.

Such an approach could very well impress both the employer and the employee with its common sense reasonableness. The employer so often professes to feel aggrieved because the Board brands him as practicing coercion when he feels that he has merely reacted as a reasonable man, and when he knows that he had no intent to coerce. He feels strongly that he should be judged on the basis of his reactions as a reasonable

²³ Note 14, *supra* at 423 and note 15, *supra*.

²⁴ Section 8 (1) of the National Labor Relations Act.

prudent man, and his irritation is not allayed by the fact that on the ground of statistics, in most cases in which employer speech is an issue, the Board has correctly found a background of hostility. The employer takes the position that he resents being castigated because he follows his human nature and reacts as the reasonable man. By deciding the speech issue on the basis of conditional privilege the Board would be able to take cognizance of this attitude of the employer. So, too, ought the union to feel satisfied that fair recognition had been given its position on the speech issue if the Board were to adopt the principle that when the employer speaks to his employees on union matters he "interferes with the exercise of their right to self-organization unless he is conditionally privileged to so speak."

The submission of some factual suppositions will disclose just how placing decisions on the speech issue upon a foundation of conditional privilege can result in reasonable distinctions, and can permit of more consistency of decision. Suppose that a union threatens workers with physical violence or economic reprisal in an effort to influence the workers' selection of representatives for the purpose of collective bargaining. The employer feels that it is reasonable for him to respond by addressing his employees in criticism of such tactics. It would appear just for the Board to find that under the circumstances the employer was conditionally privileged to speak.²⁵ Suppose an employer told his workers that he thought they did not need a union to protect their interests, but they could have one if they wished. It would seem that no fundamental concept of right would be violated if the Board found the employer's speech an unfair labor practice²⁶ on the ground of interference. Suppose a union has embarked upon a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the union. Certainly, the employer should be conditionally privileged to express himself in opposition to such practices. Mr. Justice Jackson's language for the

²⁵ See, Cooper, *What Changes In Federal Legislation and Administration Are Desirable In the Field of Labor Relations Law*, prize winning Ross Essay (1942) 28 A. B. A. J. 1385; reprinted 6 *Univ. of Detroit Law J.* 13 (1942), for the suggestion that such union action should be treated as an unfair labor practice and the privilege of the National Labor Relations Act denied to the union.

²⁶ Compare the situation, *In re Crawford Mfg. Co.*, 8 N. L. R. B. 1237 (1938).

majority in the recently decided case, *National Labor Relations Board v Indiana and Michigan Electric Co.*²⁷ would imply such a result. Suppose an employer propounds a number of questions, either oral or written, in regard to the Labor Act and gives correct answers thereto, but only such answers as related to what the employees were required to do under the Labor Act. It is understandable that the Board condemned as unfair the one-sided employer expression which said nothing about employee rights.²⁸ Suppose an employer expresses himself as opposed to dealing with union representatives who are known gangsters or thugs. Does not fairness dictate excusing the employer on the ground of conditional privilege?

On the assumption that there is nothing in the National Labor Relations Act which would prevent the suggested acceptance of such an interpretation of the Act, it becomes necessary to analyze criteria for determining whether speech is conditionally privileged. Since the concept of conditional privilege has been developed against the background of defamation, it will serve in a search for facts to survey that area of the law. Fundamentally, as we have already implied, and as Professor Hallem has pointed out in connection with his discussion on defamation,²⁹ the test should be whether the communication is reasonable under the circumstances. Or as Professor Hallem has put it in another one of his articles,³⁰ the criteria should be whether the utterer has acted as a reasonable man under the circumstances. More exact guides to decision have been furnished by the authors of the Restatement of Torts in their discussion of conditional privilege in defamation.

The Restatement presents several criteria for the determination of the existence of conditional privilege. Section 594³¹ states that "an occasion is conditionally privileged where circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently important interest of the

²⁷ 63 Sup. Ct. Rep. 394 (1943). The issue was not one of free speech, but the language seems broad enough to cover such issue.

²⁸ See, *Matter of Mock-Judson-Voehringer Co. of N. C. Inc.*, 8 N. L. R. B. 133 (1938), in the *Matter of Mansfield Mills*, 3 N. L. R. B. 901 (1937).

²⁹ *Excessive Publication in Defamation* (1932) 16 Minn. L. R. 160.

³⁰ *Character of Belief Necessary for the Conditional Privilege in Defamation* (1931) 25 Ill. L. Rev. 865.

³¹ RESTATEMENT OF TORTS (1938).

publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest." Section 595³² sets forth that "an occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently important interest of the recipient or a third person, and (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct." A perusal of the quoted passages suggests that, by substituting the phrase "the employer's attitude toward the union" for the phrase "defamatory matter" and the word "employer" for "publisher", the language can serve as a definite guide and justification for deciding speech issues under Section 8 (1) of the National Labor Relations Act.

It would not appear to need exhaustive or elaborate argument to logically establish that union conduct may be such that the employer's interest of legitimate self-protection may justify communication to that group—his employees—who seem to be in the best position to look after interests which are jeopardized by unfair union practices. Similarly, if we adopt the philosophy that capital and labor should cooperate for one common end, it would seem that improper union activity would justify employer speech in criticism. Such justification would seem to rest upon the reasonable assumption that such a relationship exists between the employer and his employees as to sanction employer intervention on the ground of safeguarding the interests of employees.

To make the suggested approach wholly realistic and workable, it becomes necessary to take cognizance of certain facts. Since in essence the viewpoint in this discussion has stressed fair play between capital and labor, it would not do to permit conditional privilege to excuse the speech of an employer who was guilty of prior or contemporaneous unfair labor practices or conduct. So too it becomes imperative that recognition be given the fact that an employer may go so far in his speech as to defeat his conditional privilege on the commonly accepted theory of excessive publication. As indicated earlier in this article, the fundamental test is always the reasonableness of the employer's

³² RESTATEMENT OF TORTS (1938).

conduct under the circumstances. Some may object to such a test as too illusive. The courts, however, have found it workable in other areas of law. In addition, it would appear no more difficult of application than the determination of coercion as a "fact"

In final analysis the intent of this treatise has been to place decision on the speech issue in National Labor Relations Board cases on a foundation which presupposes the theory that capital and labor should cooperate with each other for their common good. It would appear that an administrative board should do all possible to take a one-sided emphasis off "rights" and should place a fair emphasis upon "duties" The National Labor Relations Board should continue to be intolerant about malicious propaganda, but it must be careful not to infringe upon the inalienable right of a man to respond as a reasonable human being in the protection of his own interests, or in the protection of the interests of those who are closely associated with him as his employees.